

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460



EXTERNAL CIVIL RIGHT COMPLIANCE OFFICE
OFFICE OF GENERAL COUNSEL

January 12, 2017

Return Receipt Requested

Certified Mail# 7015 3010 0001 1267 5140

In Reply Refer to:

EPA File No. 11R-14-R4

Marianne Engelman Lado
Visiting Clinical Professor of Law
Yale Law School
127 Wall Street
New Haven, CT 06511
(203) 432-2184
(cell) (917) 608-2053

Jonathan J. Smith
Associate Attorney
Earthjustice Northeast Office
48 Wall Street, 19th Floor
New York, NY 10005

Elizabeth Haddix
Senior Staff Attorney
UNC Center for Civil Rights
323 West Barbee Chapel Rd.
Chapel Hill, NC 27517

Re: Copy of Letter of Concern

Dear Ms. Lado, Mr. Smith, and Ms. Haddix:

Consistent with United States Environmental Protection Agency's External Civil Rights Compliance Office's (ECRCO) goal to promote appropriate involvement by complainants and recipients in the external complaint process, we are writing to provide you a copy of the enclosed Letter of Concern to the North Carolina Department of Environmental Quality, related to administrative complaint No. 11R-14-R4.

Please note that ECRCO considers this letter part of its ongoing investigation. So, while we are providing the enclosed letter to the Complainants, ECRCO does not consider this letter a public document.

Ms. Lado, Mr. Smith, and Ms. Haddix – January 12, 2017

If you have any questions, please feel free to contact me at (202) 564-9649, by e-mail at dorka.lilian@epa.gov, or U.S. mail at U.S. EPA, Office of General Counsel, External Civil Rights Compliance Office (Mail Code 2310A), 1200 Pennsylvania Avenue, N.W., Washington, D.C., 20460.

Sincerely,



Lilian S. Dorka
Director
External Civil Rights Compliance Office
Office of General Counsel

Cc:

Elise B. Packard
Associate General Counsel for Civil Rights and Finance
U.S. EPA Office of General Counsel

Kenneth Lapierrre
Assistant Regional Administrator
U.S. EPA Region 4

Enclosure



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

EXTERNAL CIVIL RIGHT COMPLIANCE OFFICE
OFFICE OF GENERAL COUNSEL

January 12, 2017

Return Receipt Requested

Certified Mail# 7015 3010 0001 1267 5133

In Reply Refer to:

EPA File No. 11R-14-R4

William G. Ross, Jr.
Acting Secretary
North Carolina Department of Environmental Quality
1601 Mail Service Center
Raleigh, NC 27699-1611

Re: Letter of Concern

Dear Acting Secretary Ross:

We are writing to you to provide the North Carolina Department of Environmental Quality (NC DEQ) preliminary information related to the United States Environmental Protection Agency's (EPA) External Civil Rights Compliance Office's¹ (ECRCO) investigation into alleged discriminatory impacts from NC DEQ's operation of the Swine Waste Management System General Permit (Swine Waste General Permit). ECRCO has not concluded its investigation of EPA File No. 11R-14-R4 (Complaint) or reached final conclusions of fact or law. However, in light of the preliminary information gathered, ECRCO has deep concern about the possibility that African Americans, Latinos, and Native Americans have been subjected to discrimination as the result of NC DEQ's operation of the Swine Waste General Permit program, including the 2014 renewal of the Swine Waste General Permit.

EPA recognizes that there is new leadership at NC DEQ who were not involved in the events and correspondence described below relating to this Complaint and who will understandably need to come up to speed. ECRCO looks forward to sitting down with NC DEQ's new leadership in the next few weeks to provide any necessary background on NC DEQ's obligations under the federal nondiscrimination statutes and to discuss issues raised by ECRCO's investigation to date; any additional information NC DEQ may have relevant to the issues under investigation; the recommendations ECRCO has made below; and how to move forward on a constructive path to informally resolve the Complaint in the near future and ensure NC DEQ is in compliance with the applicable nondiscrimination statutes and regulations.

¹ Formerly the Office of Civil Rights. To eliminate confusion, except where quoting another document, this letter will use the Office's current name, rather than its name at the time of any particular action or correspondence.

Procedural Background of Complaint

On September 3, 2014, Earthjustice filed a complaint under Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000d et seq., and the EPA's nondiscrimination regulations found at 40 C.F.R. Part 7, on behalf of the North Carolina Environmental Justice Network, Rural Empowerment Association for Community Help (REACH), and the Waterkeeper Alliance, Inc. alleging discrimination based on race and national origin by NC DEQ. The complaint alleged that NC DEQ's 2014 renewal of the Swine Waste General Permit without adequate measures to control, dispose of, and monitor animal waste from industrial swine feeding operations subjects African Americans, Latinos, and Native Americans to discriminatory impacts (*e.g.*, health issues, noxious odors, nuisances, increased expenses, social and psychological harms, declining property values).

On February 20, 2015, EPA opened an investigation into:

Whether the North Carolina Department of Environmental Quality's (NC DEQ) regulation of swine feeding operations discriminates against African Americans, Latinos, and Native Americans on the basis of race and national origin in neighboring communities and violates Title VI of the Civil Rights Act of 1964 and the Environmental Protection Agency's implementing regulation.

On March 6, 2015, the Complainants and NC DEQ entered into an Alternative Dispute Resolution (ADR) process funded by EPA. ECRCO placed the investigation on hold pending the outcome of the ADR process. On March 7, 2016, the Complainants informed ECRCO that they were withdrawing from the ADR process.

On May 5, 2016, ECRCO informed NC DEQ that the ADR process between NC DEQ and the Complainants concluded without resolution; therefore, consistent with ECRCO procedures, ECRCO's investigation was reinitiated. On July 11, 2016, the Complainants filed an additional complaint alleging NC DEQ violated EPA's regulation prohibiting retaliation, intimidation, and harassment of Complainants (40 C.F.R. § 7.100). Among other events, Complainants point to events involving the Pork Councils' attempt to intervene at the January 2016 ADR session.

On August 1, 2016, NC DEQ submitted a response to the retaliation allegations. On August 2, 2016, ECRCO informed NC DEQ that it will also investigate:

Whether NCDEQ's actions or inactions, including those associated with the presence and activities of the Pork Councils related to the January 2016 mediation session, violated 40 C.F.R. § 7.100 which prohibits intimidating, threatening, coercing, or engaging in other discriminatory conduct against any individual or group because of actions taken and/or participation in an action to secure rights protected by the non-discrimination statutes OCR enforces.

On September 2, 2016, NC DEQ requested that ECRCO dismiss the original complaint. After reviewing the information provided by NC DEQ, ECRCO notified NC DEQ that the Complaint

would not be dismissed. On December 5, 2016, NC DEQ submitted a response to the Complaint.

ECRCO's investigation is being conducted under the authority of Title VI of the Civil Act of 1964, and EPA's nondiscrimination regulations (40 C.F.R. Part 7), and consistent with ECRCO's Interim Case Resolution Manual (<https://www.epa.gov/ocr/case-resolution-manual>) Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. As implemented by EPA's regulation, these prohibitions include intentional discrimination as well as practices that have a discriminatory effect on the bases of race, color, or national origin. See 40 C.F.R. §§7.35(a), 7.35(b). The EPA regulation at §7.35 (b) prohibits a recipient from using criteria or methods of administering its program or activity which have the effect of subjecting individuals to discrimination. The EPA regulation also prohibits intimidation and retaliation against any individual or group for the purpose of interfering with a right protected by Title VI or because the individual has "filed a complaint, or has testified, assisted or participated in any way in an investigation, proceeding, or hearing" under EPA's regulation or has opposed any practice prohibited by the regulation. See 40 C.F.R. § 7.100.

ECRCO's investigation thus far has included an on-site visit to interview residents; reviewing information submitted by the Complainants including declarations prepared by residents and other witnesses; reviewing scientific and other literature and interviewing the authors when appropriate, and, a review of NC DEQ's responses to the Complaint dated August 1, 2016, September 2, 2016, and December 5, 2016. NC DEQ's December 5, 2016, letter requested that ECRCO "...provide any relevant information in its possession on the issue of discrimination by the State's regulation of Swine feeding operations." Below is a summary of information gathered thus far through ECRCO's investigation.

Adverse Impacts from Industrial Swine Operations on Communities of Color

On-Site Interviews and Declarations

ECRCO conducted an on-site visit to North Carolina (November 13-15, 2016) and interviewed over 60 residents living near industrial swine operations permitted under the Swine Waste General Permit. ECRCO's interviews were conducted mostly in Duplin and Sampson counties which have the highest concentration of industrial swine operations. To investigate the effects of the permitting program more broadly throughout the state, ECRCO also conducted interviews in other counties including Northampton County on the Virginia border and Pender County near the South Carolina border.

Some of the people interviewed had previously submitted declarations to ECRCO as exhibits to the Title VI complaint, some had not. The issues raised in the declarations and the impacts they discussed are similar or identical to those heard during the interviews. Many of those interviewed who had previously provided declarations provided updates to their declarations. ECRCO found credible all those interviewed thus far in the investigation. So far, ECRCO has heard in writing and/or orally from 85 witnesses in North Carolina who live near and described problems caused by their proximity to the industrial hog operations.

Residents, many of whom have lived in these communities for generations, described problems caused by their proximity to the industrial hog operations that have negatively changed their lives and communities, including those impacts described in studies referenced or discussed below. The residents described an overpowering stench, pests -- including a constant large number of flies, and the truck traffic all associated with the hog operations have forced residents to keep doors and windows closed and significantly limit any outdoor activity. Residents said the stench permeates homes, cars, and clothing. Some residents said the strength of the odor can be so strong it causes gagging, nausea and/or vomiting. For some residents who live near large numbers of industrial swine operations, they said stench is a weekly event lasting several days. They also stated they have no warning of when confinement house fans, spraying of the hog waste, or trucks transporting live or dead hogs will again bring the stench and actual waste onto their homes, property or themselves. Some described feeling as though they are prisoners in their own homes.

Residents described the loss of community that has occurred since the industrial hog farms began operating. They reported that young adults leave and do not return because of the odors, fear of health impacts from the air and drinking water, and other impacts. Prior to the arrival of the industrial hog operations, many of their family, community, and church gatherings had been held outdoors. Now they said those events are rarely held outdoors or if attempted outdoors, they are marred or forced to end early due to odors, flies, and other impacts.

Residents described increases in cases and severity of asthma and other respiratory illnesses, nausea, headaches and other health conditions. They stated these impacts have been compounded by the increase in industrial poultry operations, as well as the operation of landfills and waste disposal sites for hog sludge and carcasses. Those who had hunted and fished for both food and enjoyment, said they no longer do so because of the odors and fear of the contamination of wild sources of food such as fish. Residents stated they no longer keep gardens or grow their own vegetables for fear of contamination. Some residents are still on well water and are concerned about the safety of their drinking water. Some residents would prefer to use their private wells rather than public drinking water, but said they have either been told not to drink it or are afraid that it is contaminated. Residents also discussed increased expenses from buying and using public water, bottled water, clothes dryers, air fresheners, pesticides, air conditioning units, and food.

When asked whether they had filed complaints with NC DEQ or local governments about the odors, pests, and waste sprayed on them or their property, some residents said they did not know how or where to file complaints. ECRCO was told the filing of complaints with NC DEQ would be pointless and has resulted in retaliation, threats, intimidation, and harassment by swine facility operators and pork industry representatives. Several residents said that for more than 15 years, the government has been well aware of the conditions they have to live with, but has done nothing to help, so complaining to NC DEQ would be futile.

ECRCO also interviewed residents who live near an industrial swine operation that began operation using the lagoon and spray field method under a Certificate of Coverage under the Swine Waste General Permit. When discussing the impacts that occurred while the facility operated under the General Permit, the residents described the same impacts as those currently

living near facilities operating under the General Permit, including nausea; headaches; odors that permeated their homes and prevented them from enjoying their yards and the outdoors; concerns about impacts to groundwater and surface water; and increased numbers of flies and other pests.

After several years of operation, the operator installed innovative technologies and practices to reduce the odor and other impacts from his operation including covering the waste lagoons; not spraying in the evenings and on weekends; and not using dead boxes. When asked to describe the current impacts from that industrial swine operation, for the most part the residents who live nearby said they rarely notice intense odors and that the number of flies has been greatly reduced. The exception was that one bordering neighbor said that the smell was unbearable during spraying. Other neighbors pointed out that the smell could also be from other industrial swine operations near that resident's property that still employ open lagoons and spray fields. ECRCO and other EPA staff who toured the operation including the confinement houses and the edge of the lagoons were surprised at how little odor there was given the number of swine housed there at that time and the presence of more than one waste lagoon.

Other Information on Adverse Impacts of Industrial Swine Operations on Nearby Residents

EPA recognizes that industrial hog operations have a negative impact on nearby residents, particularly with respect to objectionable odors and other nuisance problems that can affect their quality of life. (EPA, *Animal Feeding Operations Consent Agreement and Final Order*, 70 FR 4957, 4959 (Jan. 31, 2005)). The adverse impacts of offensive odors from North Carolina's industrial hog operations have been a known issue for more than 20 years. In 1994, the North Carolina legislature established a Blue Ribbon Panel, the Swine Odors Task Force, to study "the problem of swine odors and how to reduce them."² The report of the Swine Odors Task Force stated protests had been "numerous and well publicized."³

In part to protect North Carolina's travel and tourism industry and allow time for the completion of the studies of odor and other problems associated with swine operations, the state legislature implemented a moratorium effective March 1, 1997, on the construction or expansion of swine operations⁴ that use "an anaerobic lagoon as the primary method of treatment and land application of waste by means of a spray field as the primary method of waste disposal."⁵ Any new or expanding swine operations were required to eliminate or reduce a number of impacts from the lagoon and spray field methods including substantially eliminating ammonia emissions and odors detectable beyond the boundaries of the swine operation.⁶ The moratorium was made permanent in 2007. However, the industrial hog operations using the lagoon spray field configuration already operating at the time of the moratorium were allowed to continue to operate under the Swine Waste General Permit without the requirements to substantially eliminate ammonia emissions and odors. Today, in a handful of counties mostly in eastern North

² Dr. Johnny C. Wynne, et al., *Options for Managing Odor... a report from the Swine Odor Task Force (March 1, 1995)*, NORTH CAROLINA AGRICULTURAL RESEARCH SERVICE, N.C. STATE UNIV., available at <http://www.mtcnet.net/~jdhogg/ozone/odor/swineodr.html#notsimple>

³ *Id.*

⁴ S.L. 1997-458, H.B. 515, § 1.1(a).

⁵ G.S. § 143-215.101.

⁶ G.S. § 143-215.101 (b)(2)-(3).

Carolina there is a total of more than 9 million hogs allowed in the more than 2000 industrial hog facilities operating under the Swine Waste General Permit.

North Carolina established a rule specifically to control objectionable odors from industrial swine operations.⁷ "Objectionable odor" means any odor present in the ambient air that by itself, or in combination with other odors, is or may be harmful or injurious to human health or welfare, or may unreasonably interfere with the comfortable use and enjoyment of life or property. Odors are harmful or injurious to human health if they tend to lessen human food and water intake, interfere with sleep, upset appetite, produce irritation of the upper respiratory tract, or cause symptoms of nausea, or if their chemical or physical nature is, or may be, detrimental or dangerous to human health."⁸ North Carolina's definition of "objectionable odor" encompasses the panoply of negative effects experienced by North Carolina residents, as told to ECRCO and discussed above.

Review of Reports and Studies

The adverse impacts on nearby residents from the lagoon spray field method of treatment and disposal of waste from industrial swine operations are documented in numerous peer reviewed scientific studies, including more than thirty conducted in North Carolina.⁹ At ECRCO's request, EPA's Office of Research and Development (ORD) recently reviewed seven reports published by or with federal agencies.¹⁰ ORD stated that the reports provide consistent support for the occurrence of potential health hazards (e.g., eye, nose, and throat irritation; headaches; respiratory effects including asthma exacerbation; waterborne disease) at industrial swine operations and in their waste. Even while there is significant uncertainty regarding the levels of exposure in nearby communities to the identified contaminants and the risk of health effects attributable to those exposures, the risk for specific health effects in communities near industrial swine operations is a concern.

North Carolina's 1994 Swine Odors Task Force stated "it is not surprising to learn that living near a swine operation can affect mental health" when discussing a Duke University study of "the moods of people exposed to odors from commercial swine operations in North Carolina. Forty-four neighbors of hog operations . . . had less vigor and were significantly more tense, depressed, angry, fatigued, and confused."¹¹

Additionally, ECRCO considered the findings of the analysis prepared by Drs. Steve Wing and Jill Johnston, *Industrial Hog Operations in North Carolina Disproportionately Impact African-Americans, Hispanics and American Indians*, (revised October 19, 2015) (*Complainants' Disproportionate Impact Analysis*). While the *Complainants' Disproportionate Impact Analysis* has not undergone peer review, it uses a study protocol and methodology that are substantially similar to peer reviewed studies by Wing et al. and Johnston et al.¹² The

⁷ 15A NCAC 02D.1802(a).

⁸ 15A NCAC 02D.1801(9).

⁹ See Attachment A. Additional studies can be made available.

¹⁰ See Attachment B.

¹¹ See Wynne, et al., *supra* note 3.

¹² See Steve Wing, et al., *Environmental Injustice in North Carolina's Hog Industry* (Mar. 2000), ENVIRONMENTAL HEALTH PERSPECTIVES, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1637958/>; Jill E. Johnston, et al.,

Complainants' Disproportionate Impact Analysis concludes that the impacts from the manner in which waste is disposed of, and other impacts tied to industrial swine facilities operating under the Swine Waste General Permit, detrimentally affect those who live in neighboring properties and communities.

The *Complainants' Disproportionate Impact Analysis* also concluded, when examining those neighboring properties that African-Americans, Hispanics, and Native Americans are more likely than Whites to live near industrial swine operations granted COCs. Specifically, the *Complainants' Disproportionate Impact Analysis* concluded that, both state-wide, and in only-rural areas, African-Americans, Hispanics, and Native Americans living in North Carolina are more likely than Whites to live within 3 miles of an industrial swine operations granted COCs, and therefore suffer those detrimental effects. The *Complainants' Disproportionate Impact Analysis* looked at the steady state live weight (SSLW) of hogs within 3 miles of the center of census blocks. The SSLW was used as an indicator of density of hogs/the amount of swine feces and urine produced by the hogs in that 3-mile area. The *Complainants' Disproportionate Impact Analysis* found that for each 10 percent increase in the combined African-American, Hispanic, and Native American population and for each 10 percent increase in population for each of those census categories individually, the SSLW of hogs within 3 miles increases by anywhere from 47,000 to 165,000 pounds. This analysis concludes that there is a linear relationship between race/ethnicity and the SSLW or density of hogs.

Intimidation/Retaliation

The Complainants raised allegations of intimidation and harassment in their written submissions to ECRCO and during interviews related to the appearance of and actions by national and local representatives of the pork industry at what was to be a confidential ECRCO-sponsored alternative dispute resolution mediation session between NC DEQ and the Complainants. Complainants claim that, although NC DEQ representatives knew that complainants did not want representatives from the National Pork Producers Council and North Carolina Pork Council (Pork Councils) at this confidential meeting, NC DEQ representatives appeared to encourage their attendance and participation.

NC DEQ's responses in its letters dated August 1, 2016, and December 5, 2016, in part question whether complainants felt intimidated by the Pork Council representatives' presence at the January 2016 mediation session. NC DEQ stated in both letters that "it strains credulity that these individuals were intimidated by the fact that they would be identified by representatives of organizations whom these individuals routinely criticized at public forums."¹³ The following information provided to ECRCO may assist NC DEQ to better understand in part the context within which the Complainants have raised concerns about harassment, retaliation, and intimidation.

Wastewater Disposal Wells, Fracking, and Environmental Injustice in Southern Texas (Mar. 2016), AMERICAN JOURNAL OF PUBLIC HEALTH (2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4816143/>.

¹³ Letter to Lilian S. Dorka, Acting Director, EPA Office of Civil Rights from Sam M. Hayes, General Counsel, North Carolina Department of Environmental Quality (Dec. 5, 2016), at 8-9.

During interviews, residents including REACH members, and current and former Riverkeepers working in the eastern North Carolina rivers recounted first hand incidents of harassment, intimidation, and retaliatory behavior, including physical and verbal threats, by swine facility owners and/or operators and their employees. The accounts ranged from sustained tailgating; driving back and forth in front of the houses of residents who have complained; filming or photographing residents who are taking photos or videos of spraying; being yelled at; confronted in parking lots and at intersections; and threatened with guns and other physical violence.

Those interviewed stated that these are regular events, rather than an exception, creating a climate where residents believe that if they file an environmental complaint with NC DEQ, they will likely be retaliated against by neighboring swine facility operators or employees. The Riverkeepers stated that they are subjected to this type of harassment and intimidation two or three times every couple of weeks. Particularly egregious instances brought to ECRCO's attention include a local industrial swine facility operator entering the home of an elderly African American woman and shaking the chair she sat in while threatening her and her family with physical violence if they continued to complain about the odors and spray; the firing of a gun in the air when an African American REACH member tried to speak to a person sitting on their porch; and a truck that sped up and swerved toward a Riverkeeper who was standing on the side of a public road teaching a group of volunteers how to sample water from public ditches. Those interviewed believe that the NC DEQ's lack of response to their complaints lends to the hostile environment and emboldens local facility owners and operators to act in a threatening and intimidating manner.

ECRCO has grave concerns about these reports indicating a potential hostile and intimidating environment for anyone seeking to provide relevant information to NC DEQ or EPA. Also, ECRCO is concerned about the circumstances surrounding the attendance by pork industry representatives during the mediation session.

Under certain circumstances, Title VI's prohibition on retaliation extends to third parties, which may include lower-level recipient employees, program beneficiaries or participants, organizations with a relationship to the recipient such as contractors, and others. EPA Title VI regulations provide that "[n]o recipient or other person" may retaliate. 7 C.F.R. § 7.100. Recipients themselves have two key obligations related to third party retaliation: first, to protect individuals from potential retaliation, recipients are obligated to keep the identity of complainants confidential except to the extent necessary to carry out the purposes of the Title VI regulations, including conducting investigations, hearings, or judicial proceedings; and second, recipients must investigate and respond when a third party engages in retaliatory conduct that Title VI prohibits. As with other types of third party conduct, such as harassment, the extent of the recipient's obligation is tied to the level of control it has over the bad actor and the environment in which the bad acts occurred. *See Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 644 (1999). EPA makes these determinations on a case-by-case basis in light of the facts and totality of circumstances in a particular case.

NC DEQ's Response to the Complaint¹⁴

In part, NC DEQ's December 5, 2016 letter responding to the Complaint reiterated arguments in favor of dismissal previously submitted to ECRCO by letter dated September 2, 2016. ECRCO has considered the information in both letters concerning the alleged reduction of adverse impacts by the permit renewal. As ECRCO pointed out previously, NC DEQ itself explained that the majority of the changes from the 2009 permit to the "current permit are structural and grammatical in nature"¹⁵ and "do not make the Permit more stringent, costly or burdensome."¹⁶ NC DEQ's responses did not state or explain how the 2014 Permit will reduce adverse impact from the source, significantly or otherwise; therefore, as stated in ECRCO's letter dated October 5, 2016, ECRCO does not believe that the argument constitutes a proper basis for dismissal of the complaint.

Similarly, NC DEQ's December 5, 2016 letter raised again a concern that the Complainants did not pursue an administrative appeal of the Swine Waste General Permit. NC DEQ explained that the permit appeal process under state law is an appropriate forum for "those who believe that the terms of the General Permit failed to comply with state law, or if a more effective means of pollution control should have been incorporated into the General Permit."¹⁷ The allegation raised to EPA by the Complainants is that the Swine Waste General Permit fails to comply with federal law, namely Title VI of the Civil Rights Act of 1964. For almost 30 years, recipients of EPA financial assistance have been required under EPA's Title VI implementing regulation to have in place a grievance process. 40 C.F.R. § 7.90. The NC DEQ administrative forum to investigate and resolve exactly the issues of discrimination alleged in the Complaint that should have been available to Complainants did not exist when they filed their Complaint with EPA. Regardless, as NC DEQ previously acknowledged in its October 5, 2016 letter, there is no requirement under Title VI that Complainants exhaust administrative remedies before filing a discrimination complaint with EPA.

NC DEQ's response did not deny or refute the allegation that the industrial hog facilities operating under the Swine Waste General Permit were creating discriminatory impacts, rather, NC DEQ points to siting decisions by operators and changing demographics as reasons why certain communities may be more impacted than others. The impacts of concern in this investigation flow from the operation of the facilities. While an industrial swine facility operator may apply for an individual permit or certificate of coverage to operate in a particular location, it is NC DEQ that determines whether that facility will be allowed to operate and under what type of permit and its conditions.

NC DEQ also pointed out that the population has grown and the demographics have changed in areas of high concentration of industrial swine facilities since the first Swine Waste General

¹⁴ ECRCO is not specifically addressing all of the points NC DEQ raised in its December 5, 2016 letter, but this should not be interpreted as ECRCO accepting those arguments.

¹⁵ State of North Carolina, Department of Environmental and Natural Resources, *Report of the Proceedings on the Proposed Renewal of the State General Permits for Animal Feeding Operations, Public Meeting, November 12, 2013, Statesville, North Carolina, Public Meeting, November 14, 2013, Kenansville, North Carolina*, p. 4.

¹⁶ *Id.*, at pp. 5 and 8.

¹⁷ Letter to Lillian S. Dorka, Acting Director, EPA Office of Civil Rights from Sam M. Hayes, General Counsel, North Carolina Department of Environmental Quality (Dec. 5, 2016), at 2.

Permit was issued. NC DEQ discussed the population growth in Duplin and Sampson Counties, highlighting in particular the rapid growth of the Latino population, and speculated that the population growth may have been due to jobs created by the industrial hog industry. The reasons for an increase in the minority population in the past 20 plus years in Duplin and Sampson Counties does not change NC DEQ's obligation to ensure that its current programs and activities do not have the effect of subjecting individuals to discrimination based on race, color or national origin.

NC DEQ requested information ECRCO has on anecdotal as well as systemic concerns relative to the Swine Waste General Permit Program. With regard to concerns about individual facilities, based on interviews of Riverkeepers working in eastern North Carolina, it is our understanding that for more than a decade they have provided NC DEQ documentation of hundreds of instances of waste spray or drift entering play areas; landing on people in their gardens, on their cars, and on their houses; runoff of hog waste entering streams and ditches; and improper spraying of waste after issuance of a National Weather Service Flood Watch. Riverkeepers stated they have provided NC DEQ the information through eyewitness accounts, photographs with time, date, and GPS coordinates embedded in the metadata, and/or video. Some of this information has been shared with ECRCO as well. Witnesses have stated that, to their knowledge, very few of these reports have received any mitigating action or resulted in enforcement action by NC DEQ. The temporal and geographic breadth of the anecdotal instances documented by Riverkeepers, points to systemic issues about which NC DEQ is aware.

Nondiscrimination Procedural Safeguards

At the time the Complaint was filed, NC DEQ was not in compliance with EPA's longstanding requirements under 40 C.F.R. Part 7, Subpart D which form the foundational elements of a recipient's program to implement the federal non-discrimination statutes.¹⁸ These regulatory requirements include a continuing notice of non-discrimination under 40 C.F.R. § 7.95, grievance procedures available to the public, and the designation of at least one person to coordinate its efforts to comply with its non-discrimination obligations under 40 C.F.R. § 7.85(g).

At some point during the summer of 2016, NC DEQ appears to have begun the process of establishing its non-discrimination program. However, it is unclear whether NC DEQ has put in place the foundational elements of a properly functioning nondiscrimination program. ECRCO has attached a Procedural Safeguards Checklist (Attachment C) to assist NC DEQ in evaluating whether it has in place the appropriate foundational elements to ensure that it will meet its obligations under the federal nondiscrimination statutes.

Mitigation

As NC DEQ's December 5, 2016 letter noted, the study of the feasibility of environmentally superior swine waste technologies to the lagoon and spray field method began back in 2000.

¹⁸ Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, Section 13 of Federal Water Pollution Control Act of 1972, and Title IX of the Education Amendments of 1972 (hereinafter referred to collectively as the federal non-discrimination statutes).

Some reviews of particular technologies were concluded more than a decade ago. According to the designee who made the decisions regarding the economic and environmental feasibility of the technologies, “[S]ubsequent research has focused on improving the economics of targeted technologies while maintaining the environmental performance.”¹⁹ EPA’s ORD found in its review of reports discussed above that a number of risk management options are available to reduce potential health risks to nearby communities. EPA, USDA, and academia have continued to work on new processes, methods, and technologies to reduce impacts from industrial swine operations and waste since the review of available technology mentioned in NC DEQ’s letter was completed.

Recommendations

ECRCO has not concluded its investigation and this letter does not contain ultimate findings of facts or law. Rather, ECRCO has summarized some of the information gathered to date to explain why ECRCO continues to be concerned about possible discriminatory impacts.

The totality of the information ECRCO has collected to date in its investigation, including NC DEQ’s response to the complaint, indicates that the types of adverse impacts described above are being felt by large segments of the communities of color and are potential evidence of systemic concerns, not purely anecdotal claims. The information raises a concern that Swine Waste General Permit Program may run afoul of Title VI and EPA’s Title VI regulations. NC DEQ’s responses thus far have not provided a reason to dismiss the complaint or halt the investigation, nor has the information or arguments provided served to diminish ECRCO’s level of concern.

On this basis, EPA makes a series of preliminary recommendations and requests a meeting to explore informal resolution. The recommendations are designed to focus an inquiry that will help them determine whether the problems are being caused by: (1) structural problems with the General Permit Program; (2) a lack of enforcement of the requirements of the permit (for example, no odors, no discharges, no spray beyond borders); or, (3) both.

ECRCO recommends that NC DEQ:

- Conduct an assessment of current Swine Waste General Permit to determine what changes to the Permit should be made in order to substantially mitigate adverse impacts to nearby residents. Determine which changes are currently within NC DEQ’s authority to make and develop a timetable for adopting them. For Permit changes necessary to substantially mitigate the adverse impacts that NC DEQ cannot adopt, determine the source of the impediment to their adoption.
- Conduct an assessment of current regulations applicable to facilities operating under the Swine Waste General Permit to determine what if any changes to the regulations would be required to substantially mitigate adverse impacts to nearby residents. Determine which changes are currently within NC DEQ’s authority to make and develop a timetable

¹⁹ Williams, C.M. Williams, “C.M. “Mike” Williams: Waste economics.” *The News & Observer*, 8 June 2015. <http://www.newsobserver.com/opinion/letters-to-the-editor/article23534074.html>.

to adopt them. For regulatory changes necessary to substantially mitigate the adverse impacts that NC DEQ cannot adopt, determine the source of the impediment to their adoption.

- Evaluate the feasibility of risk management options available to reduce adverse impacts to nearby communities, including covering the waste lagoons; not spraying in the evenings and on weekends; not using dead boxes; and others described in this letter.
- Conduct an assessment of current mitigation technologies that would satisfy NC DEQ's performance criteria for new or expanding industrial swine operations and what if any impediments exist to adopting those technologies.
- Conduct a self-evaluation of the sufficiency of NC DEQ's enforcement and compliance efforts for existing rules governing the operation of its Swine Waste Management Program, including its response to odor and adverse health effects complaints, to determine whether implementation of any corrective measures are necessary including those to ensure a prompt and appropriate response to odor and other complaints. Determine which corrective measures are currently within NC DEQ's authority to make and develop a timetable for adopting them.
- Conduct an evaluation of NC DEQ's current policies and adjust them as appropriate to ensure the protection of confidentiality and identities of residents who provide information to NC DEQ about either environmental or civil rights complaints.
- Conduct a self-evaluation of its new non-discrimination program using the attached Procedural Safeguards Checklist to determine whether it has in place all the foundational elements listed to ensure that NC DEQ will meet its obligations under the federal nondiscrimination statutes. If any of the elements are not in place, NC DEQ should correct those deficiencies.

ECRCO looks forward to working with NC DEQ and would like to discuss with NC DEQ as soon as possible: the concerns previously outlined regarding the impacts on residents and communities; any additional information NC DEQ believes is relevant to the issue of whether Title VI has been violated; ECRCO's preliminary recommendations; NC DEQ's non-discrimination program; and the potential for informal resolution of this Complaint.

I will be contacting you in the next day or so to schedule a meeting to occur in the next two weeks. It is our goal to be able to reach informal resolution as soon as possible. We believe that through productive conversations over the next 60 days, we can negotiate an Informal Resolution Agreement that would address the concerns discussed in this letter and that would include a plan for moving forward on the above recommendations. If after discussion with NC DEQ, ECRCO does not believe informal resolution is possible, ECRCO will move forward to conclude its

investigation and issue formal findings. If you have any questions, please feel free to contact me at (202) 564-9649, by e-mail at dorka.lilian@epa.gov, or U.S. mail at U.S. EPA, Office of General Counsel, External Civil Rights Compliance Office (Mail Code 2310A), 1200 Pennsylvania Avenue, N.W., Washington, D.C., 20460.

Sincerely,



Lilian S. Dorka
Director
External Civil Rights Compliance Office
Office of General Counsel

Cc:

Elise B. Packard
Associate General Counsel for Civil Rights and Finance
U.S. EPA Office of General Counsel

Kenneth Lapierre
Assistant Regional Administrator
U.S. EPA Region 4

Attachments

ATTACHMENT A

1. Wing, Steve, et al., *Environmental Injustice in North Carolina's Hog Industry*, 108 *Envtl. Health Perspectives* 225 (2000)
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3. Wing Steve, et al., *Air Pollution and Odor in Communities Near Industrial Swine Operations*. *Environ. Health Perspect.* 116:1362-1368 (2008)
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5. Avery, Rachel Horton, et al., *Malodor as a Trigger of Stress and Negative Mood in Neighbors of Industrial Hog Operations*, 99 *Am. J. Pub. Health Suppl.*, S610 (2009)
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8. Avery, Rachel, et al., *Odor from Industrial Hog Farming Operations and Mucosal Immune Function in Neighbors*, 59(2) *Archives of Env'tl. Health* 101 (2004)
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16. Costanza, Jennifer K., et al., *Potential Geographic Distribution of Atmospheric Nitrogen Deposition from Intensive Livestock Production in North Carolina, USA*, 398 *Sci. Total Env't* 76 (2008)
17. Schiffman, Susan S., et al., *Symptomatic Effects of Exposure to Diluted Air Sampled from a Swine Confinement Atmosphere on Healthy Human Subjects*, 113 *Env'tl. Health Perspectives* 567 (2005)

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20. Wendee, Nicole, *CAFOs and Environmental Justice: The Case of North Carolina*, 121 Env'tl. Health Perspectives A182, A186 (2013)
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ATTACHMENT B

1. EPA, 2013. *Literature Review of Contaminants in Livestock and Poultry Manure and Implications for Water Quality* (No. EPA 820-R-13-002). EPA, Washington, DC.
2. EPA, 2004. Risk Assessment Evaluation for Concentrated Animal Feeding Operations (No. EPA/600/R-04/042). EPA, Washington, DC.
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4. Harden, S.L., 2015. *Surface-water quality in agricultural watersheds of the North Carolina Coastal Plain associated with concentrated animal feeding operations* (No. 2015-5080). USGS, Reston, VA.
5. Hribar, J.B., 2010. *Understanding Concentrated Animal Feeding Operations and Their Impact on Communities*. NALBOH, Bowling Green, OH.
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ATTACHMENT C

CHECK LIST FOR PROCEDURAL SAFEGUARDS FOR RECIPIENTS FEDERAL NON-DISCRIMINATION OBLIGATIONS

Federal Non-Discrimination Statutes: Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, Section 13 of Federal Water Pollution Control Act of 1972, and Title IX of the Education Amendments of 1972.²⁰

Item	Yes & Supporting Documentation	Not Yet	Checking
Notice of Non-Discrimination under the Federal Non-Discrimination Statutes²¹			
See attachment for recommended text of notice			
The non-discrimination notice is posted:			
• in a prominent location in your offices and facilities			
• prominently on your website			
• in any publications			
Grievance Procedures for Complaints filed under the Federal Non-Discrimination Statutes²²			
A grievance procedure that:			
• Clearly identifies the Non-Discrimination Coordinator, including contact information			
• Explains the role of the Non-Discrimination Coordinator relative to the coordination and oversight of the grievance procedures			
• States who may file a complaint under the procedures			
• Describes which formal and informal processes are available, and the options for complainants in pursuing either			

²⁰ 40 C.F.R. § 7.85(g)

²¹ 40 C.F.R. § 7.95(a).

²² 40 C.F.R. § 7.90.

Item	Yes & Supporting Documentation	Not Yet	Checking
<ul style="list-style-type: none"> Explains that an appropriate, prompt and impartial investigation of any allegations filed under federal non-discrimination statutes will be conducted 			
<ul style="list-style-type: none"> States that the preponderance of the evidence standards will be applied during the analysis of the complaint 			
<ul style="list-style-type: none"> Contains assurances that retaliation is prohibited²³ and that claims of retaliation will be handled promptly if it occurs 			
<ul style="list-style-type: none"> States that written notice will be promptly provided about the outcome of the investigation, including whether discrimination is found and the description of the investigation process²⁴ 			
<ul style="list-style-type: none"> Is published in print in general publications distributed to the public 			
Non-Discrimination Coordinator²⁵			
At least one Non-Discrimination Coordinator to ensure compliance with the federal non-discrimination statutes			
Non-Discrimination Coordinator or other individual responsible for:			
<ul style="list-style-type: none"> Providing information internally and externally regarding rights to services, aids, benefits, and participation without regard to race, national origin, color, sex, disability, age or prior opposition to discrimination 			
<ul style="list-style-type: none"> Providing notice of your Agency's formal and informal grievance processes and the ability to file a discrimination complaint 			
<ul style="list-style-type: none"> Establishing grievance policies and procedures or mechanisms (e.g., an investigation manual) 			
<ul style="list-style-type: none"> Tracking all complaints filed with your Agency under federal non-discrimination statutes including any patterns or systemic problems 			

²³ 40 C.F.R. § 7.100.

²⁴ Whether OCR considers complaint investigations and resolutions to be "prompt" will vary depending on the complexity of the investigation and the severity and extent of the alleged discrimination. For example, the investigation and resolution of a complaint involving multiple allegations and multiple complainants likely would take longer than one involving a single allegation of discrimination and a single complainant.

²⁵ 40 C.F.R. § 7.85(g).

Item	Yes & Supporting Documentation	Not Yet	Checking
• Semiannual reviews of all complaints filed with your Agency under federal non-discrimination statutes in order to identify and address any patterns or systemic problems			
• Appropriate training for your Agency's employees on your Agency's non-discrimination policies and procedures and obligations to comply with federal non-discrimination statutes			
• Updating complainants on the progress of their complaints filed with your Agency under federal non-discrimination statutes and any determinations made			
• Periodic evaluations of the efficacy of your Agency's efforts to provide services, aids, benefits, and participation in any of your Agency's programs or activities without regard to race, national origin, color, sex, disability, age or prior opposition to discrimination			
Public Participation			
Written and published public participation process/procedures that provide that when your Agency prepares a public participation plan for a specific action, it will include:			
• A description of the community (including demographics, history, and background)			
• A contact list of Agency officials with phone numbers and email addresses to allow the public to communicate via phone or internet			
• A list of past and present community concerns (including any complaints filed under the federal non-discrimination statutes)			
• A detailed plan of action (outreach activities) your Agency will take to address concerns			
• A contingency plan for unexpected events			
• Location(s) where public meetings will be held (consider the availability and schedules of public transportation)			

Item	Yes & Supporting Documentation	Not Yet	Checking
• Contact names for obtaining language assistance services for limited-English proficient persons, including, translation of documents and/or interpreters for meetings			
• Appropriate local media contacts (based on the culture and linguistic needs of the community)			
• Location of the information repository			
Access To Programs And Activities by Persons with Limited English Proficiency			
Has your Agency conducted an appropriate analysis described in OCR's LEP Guidance found at 69 FR 35602 (June 25, 2004) and http://www.lep.gov to determine what language services it may need to provide to ensure that individuals with limited-English proficiency can meaningfully participate in the process?			
Has your Agency developed a language access plan consistent with the details found in OCR's training module for LEP. http://www.epa.gov/civilrights/lepaccess.htm ?			
Does your Agency have written and published procedures that:			
• Ensure meaningful access to all of your Agency's programs and activities to persons with limited-English proficiency and individuals with disabilities			
• Make communities you serve aware that foreign language services are available			
• Translate standardized documents			
• Provide for simultaneous oral interpretation of live proceedings such as town hall meetings or public hearings			
Access To Programs And Activities by Persons with Disabilities			
Does your Agency have written and published procedures to ensure to provide access to your programs, services, and activities for individuals with disabilities that:			
• Provides at no cost appropriate auxiliary aids and services including, for example, qualified interpreters to individuals who are deaf or			

Item	Yes & Supporting Documentation	Not Yet	Checking
hard of hearing, and to other individuals as necessary to ensure effective communication or an equal opportunity to participate fully in the benefits, activities, programs and services provided by your Agency in a timely manner and in such a way as to protect the privacy and independence of the individual			
<ul style="list-style-type: none"> Ensures that your Agency's facilities and non-Agency facilities utilized by your Agency (e.g., if your Agency holds a public hearing at a school) are physically accessible for individuals with disabilities 			
<ul style="list-style-type: none"> Makes communities you serve aware that services for individuals with disabilities are available 			

NOTICE OF NON-DISCRIMINATION RECOMMENDED TEXT

[Agency Name] does not discriminate on the basis of race, color, national origin, disability, age, or sex in the administration of its programs or activities, as required by applicable laws and regulations.

[Insert name and title of Non-Discrimination Coordinator] is responsible for coordination of compliance efforts and receipt of inquiries concerning non-discrimination requirements implemented by 40 C.F.R. Part 7 (Non-discrimination in Programs or Activities Receiving Federal Assistance from the Environmental Protection Agency), including Title VI of the Civil Rights Act of 1964, as amended; Section 504 of the Rehabilitation Act of 1973; the Age Discrimination Act of 1975, Title IX of the Education Amendments of 1972, and Section 13 of the Federal Water Pollution Control Act Amendments of 1972.

If you have any questions about this notice or any of [Agency Name]'s non-discrimination programs, policies or procedures, you may contact:

[Insert name and title of Non-Discrimination Coordinator]

[Insert Agency Name and Address]

[Insert phone number of Non-Discrimination Coordinator]

[Insert email address of Non-Discrimination Coordinator]

If you believe that you have been discriminated against with respect to a [Agency Name] program or activity, you may contact the [insert title of Non-Discrimination Coordinator] identified above or visit our website at [insert] to learn how and where to file a complaint of discrimination.